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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 332

CLAWSON & BALS, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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The petition filed herein is directed primarily toward showing why a writ of certiorari should issue. Argument in support of the petitioner's contentions, that the Court of Appeals erred, has been touched upon only lightly and will be dealt with in detail in briefs filed upon the granting of the writ.

The brief filed in opposition to the petition, however, raises certain questions which if unanswered, even briefly, might give this Court erroneous impressions concerning the merits of the controversy.

1. The Government's brief (p. 6) states that the District Court found that the used connecting rods were

scrap, *i. e.*, unfit to perform their proper function as connecting rods, and that the Court of Appeals affirmed the District Court's judgment in its entirety.

The District Court did make such a finding (R. 93). Such finding was one of the points relied upon on appeal to the Court of Appeals (R. 98, Point 2).

The Court of Appeals, however, acknowledged that the used rods now being reconditioned had a commercial value of $1.10, as compared with scrap value of only three or four cents, and said (R. 111):

> "It seems perfectly clear, however, that the used rods it is now using are not in such a condition to give *satisfactory* service or the owners would not be offering them with money in exchange for plaintiff's reconditioned rods." (Emphasis supplied.)

The Court of Appeals thus actually acknowledged that the rods used in the present process of reconditioning, which were merely worn, were usable, and had commercial value as connecting rods, were not scrap except in the erroneous sense that scrap includes merely worn (as well as worn-out) articles of commerce.

This error of the Court of Appeals is one of the specifications urged (Petition for Writ of Certiorari, p. 6).

2. The decisions of courts of appeal, cited in the Government's brief (pp. 6-7) involve worn-out articles, not merely worn articles that have not lost their commercial function and value (Petition for Writ of Certiorari, p. 7). Approval of these decisions by Congress, and approval of Treasury Regulations providing that the term "manufacturer" includes a person who from *scrap, salvage or junk material* produces a taxable article, gives no support to the Court of Appeals' decision in the instant case, which holds that the term "manufacturer" includes a person who reconditions a worn connecting rod, which does not

render service to the satisfaction of its user, but which still is usable, has commercial value as a connecting rod, and is not worn-out.

3. The footnote argument in the Government's brief (p. 6), that the taxpayer (petitioner) may be concluded on the rebabbitting phase by *Clawson & Bals* v. *Harrison*, 108 F. 2d 991, is not founded upon points raised by the pleadings.

Even though transactions involved in different taxable periods are similar, the doctrine of *res adjudicata* does not apply. *Monteith Brothers Co.* v. *U. S.*, 142 F. 2d 139 (C. A. 7th); *Henricksen* v. *Seward*, 135 F. 2d 986 (C. A. 9th); *Campagna* v. *Harrison*, 135 F. 2d 334 (C. A. 7th); *Stoddard* v. *Commissioner*, 141 F. 2d 76 (C. A. 2nd).

Furthermore, the processes involved in the two periods were different in almost every respect (R. 47-48).

4. The statement in the Government's brief (pp. 9-10) that Section 3443(a)(1) of the Internal Revenue Code "provides for a credit only where the tax has already been paid on the sale to a manufacturer who, in turn, uses the article in the manufacture of another article on the sale of which a tax is imposed," is erroneous.

That section provides for a credit "to a manufacturer or producer, in the amount of any tax under this chapter *which has been paid with respect to the sale* of any article * * * purchased by him and used by him as material in the manufacture" of another taxable article.

The statute gives credit for any taxe paid with respect to the first *sale* of the article, whether sold and resold once or through a dozen middlemen before being purchased by a manufacturer for use in the manufacture of another taxable article.

5. The old *Clawson & Bals* case is founded upon differ-

ent facts, and was decided upon entirely different principles than those involved in the instant case. It involved worn-out articles having use and value only as scrap or junk.

The instant case, contrary to the Government's contention (Brief, p. 10), has gone beyond the "authoritative guides" of previous decisions and Treasury Department rulings, all of which have been based upon that same principle.

Under the decision of the Court of Appeals in the instant case, every automobile repairman who reconditions and improves the serviceability of an article which does not render "satisfactory service" in its worn condition will be subject to the manufacturers' excise tax. The Court of Appeals has, by its decision, abolished all distinction between "manufacture' and "repair."

This decision, if left unturned, will, in our sincere opinion, crop up time after time in the future in cases involving the distinction between manufacturers and repairers.

Respectfully submitted,

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NOV -2 1950